IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

JAN EMIL DONATO, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 17473.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

APPELLANT'S REPLY BRIEF.

J. B. TIETZ,
410 Douglas Building,
South Spring and Third Streets,
Los Angeles 12, California,
Attorney for Appellant.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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Appellee seeks to bar consideration of appellant's two points on appeal by interposing the rule of exhaustion of administrative remedies.

This is a useful rule but, being court-created its harsh result may be disregarded on suitable occasion. Such has been the action of many courts, including the Supreme Court. After showing this appellant will present reasons why the rule should not be applied to his appeal.

I.

Exhaustion Rule Has Been Relaxed.

Appellee's brief devotes itself *solely* to the exhaustion point. This is an implicit admission that if its argument on exhaustion is not acceptable to this Court it is conceded that the conviction was based upon an invalid board order; in other words that there was no basis in fact for denying Donato a conscientious objector classification and/or that one or more illegal bases were used in the classification process.

This situation, then, is closely analogous to that in a case very recently decided by the Eighth Circuit. In *Glover* v. *United States,* 286 F.2d 84, 8th Cir., 1961, the Court said:

> "In view of the Government's concession, on this appeal, that there was no basis in fact for the 1-A classification of the defendant in this case, a detailed discussion based upon a careful analysis of the draft board's files and records as to this registrant is unnecessary."

The Eighth Circuit then went on to consider the government's exhaustion argument and, finding it wanting, reversed Glover's conviction.

The Eighth Circuit, it is to be observed, is leading the way in going by the "feel" of the truth in the case, that is, justice, rather than abruptly shutting the door in the face of a young man, unadvised, who has not strictly followed the exhaustion rule. In its last two draft case decisions it was confronted with the two usual type situations of failure to exhaust administrative remedies in the Selective

Service System: failure to report and failure to appeal. In both opinions it chose to decide the cases on their merits and to not apply the rule.

The first sentence of that court's opinion in *Batterton* v. *United States,* (8 Cir., 1958) 260 F.2d 233, shows that the Selective Service Registrant had failed to complete the administrative process by refusing to appear at the induction station. The Court decided the case on the merits, making no point at all of the failure to exhaust element involved. Its second and very recent decision, was *Glover* v. *United States,* (8 Cir., 1961) 286 F.2d 84, where the court discussed this element at some length and concluded the failure to appeal the last classification notice was not a bar to a determination of the merits.

Appellee's Brief argues the exhaustion point as if the rule is inflexible, as if it never has exceptions. This is an incorrect view of the cases, including the decisions of this court.

This court (Ninth Circuit), even when invoking the rule has explicitly pointed out that despite of the rule it had considered the merits but found the appellant's record wanting. See *Rowland* v. *United States,* (9th Cir., 1953) 207 F.2d 621: "Appellant having failed to appeal from his classification, we are not required to consider this contention [no basis in fact]. However, we have considered it and reject it for the following reasons: * * *" (625). Compare *Palmer* v. *United States,* 223 F.2d 893 (3 Cir., 1955), a four to three *en banc* decision. Palmer had refused to avail himself of *any* administrative procedure or remedy (he was what the pacifists term an "absolutist"), yet

three appellate judges favored his appeal viewing the failure to consider his merits exalting "form over substance" (897). The three-judge minority also pointed out: "The courts of appeal and district courts have been divided as to whether exhaustion of all administrative remedies must be shown in these selective service cases." (901) and cited a string of cases to show this.

The Supreme Court, in many situations, has ignored the rule where it appeared the cases should be decided on the merits: we read in *U. S.* v. *Abilene & So. Ry. Co.*, 265 U.S. 274, 282 (1924): "* * * Whether it (the court) should have denied relief until all possible administrative remedies had been exhausted was a matter which called for the exercise of its judicial discretion."

In *Levers* v. *Anderson*, 326 U.S. 219 (1945), the court said: "[T]his rule does not automatically require that judicial review always be denied where rehearing is authorized but not sought. This is shown by our past decisions (citing cases) from which we see no reason to depart." Also see *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 773 (1947); *Eccles* v. *Peoples Bank*, 333 U.S. 426, 434 (1948).

Then there are the cases where the agency had acted beyond its jurisdiction (as Donato claims): *Gonzales* v. *Williams*, 192 U.S. 1, 48 L. Ed. 317 (1904); *Skinner and Eddy Corp.* v. *U. S.*, 249 U.S. 557 (1919); *P. U. C.* v. *United Fuel Gas Co.*, 317 U.S. 456 (1943); *Ill. Comm.* v. *Thompson*, 318 U.S. 675 (1943).

Additionally there are the cases where the agency had entered final order and only administrative reconsider-

ation or appeal remains (discretionary for court to take jurisdiction). *Prendergast* v. *N. Y. Tel. Co.*, 262 U.S. 43, 48 (1923); *U. S.* v. *Abilene & S. R. Co., supra; Levers* v. *Anderson, supra;* Fed. Adm. Pro. Act, Sec. 10 (c), and finally, those where, as in Donato's case the agency or government brings the court proceeding civilly or criminally and the defendant merely defends against an invalid order: *F. P. C.* v. *Panhandle E. Pipe Line Co.*, 337 U.S 498 (1949).

Other courts have turned a blind eye to this rule. In passing it is well to note that even with respect to acts considered jurisdictional, such as filing an appeal within the 10 day period the courts have softened the rigor of the rule to prevent injustice. See *Belton* v. *United States*, 259 F.2d 811 (D.C. Cir., 1958); *Blunt* v. *United States*, 244 F.2d 355 (D.C. Cir., 1957); *West* v. *United States*, 222 F.2d 774 (D.C. Cir., 1954); *Williams* v. *United States*, 188 F.2d 41 (D.C. Cir., 1951); *Boykin* v. *Huff*, 121 F.2d 865 (D.C. Cir., 1941); but see *Wilkinson* v. *United States*, 28 Law Week. 2250.

In *Belton, supra*, the court cites *Christoffel* v. *U. S.*, 190 F.2d 505, 590 (C.A. D.C.):

> "[I]n a criminal case in which a sentence of imprisonment is involved, there is a public interest against denial of consideration on appeal of substantial questions as to the lawfulness of conviction. For if the conviction is erroneous it is abhorrent to justice that a defendant shall nevertheless suffer such a penalty for the crime charged. The Supreme Court has on this account vested the United States Court of Appeals with discretion to consider and determine ques-

> tions on appeal notwithstanding failure of counsel to make due compliance with the usual procedural requirements. This discretion may be exercised either on application of a party or by the court sua sponte."

How much more applicable is this humane principle to a situation where a young layman like Donato, not his counsel, is the one who didn't comply with the prerequisite "requirements."

The chief purpose of the doctrine of exhaustion of administrative remedy is to relieve the courts of a burden better borne by specialists in the various administrative agencies.

The doctrine was not formulated to deprive young men, unassisted by counsel, of their day in court: cf. *Cox* v. *Wedemeyer,* (9th Cir., 1951) 192 F.2d 920, where it was pointed out that these draft registrants are "unskilled in legal procedure * * * and none of them represented by counsel." (922-923). Also compare *Berman* v. *Craig,* (3 Cir., 1953) 207 F.2d 888, where The Third Circuit declared: "Registrants are not thus to be treated as though they were engaged in formal litigation assisted by counsel (891)."

The doctrine of exhaustion of administration remedies should never be considered inflexible. Many special circumstances excuse the registrant. This general proposition was somewhat recently restated in *United States* v. *Harvey,* 131 F. Supp. 493:

> "* * * the rule that administrative relief must be exhausted before resorting to the courts did not originate in the constitution, or any statute, but came into being simply as a point of judicial policy adopted

by the courts, and the courts do not recognize that it must always be applied in hidebound fashion. The rule will be passed by, if there is good reason for making an exception, and that has been done by both the federal and state courts." (496).

So, in *U. S. ex rel. Filomio* v. *Powell*, 38 F. Supp. 183, the court observed:

> "Evidence is conflicting as to whether Filomio demanded the questionnaire in order that he might perfect his appeal. We do not feel that it was readily available, and hence his omission in this respect was beyond his control."

We believe our situation is analogous to the Filomio situation in that the firefighting duty made the perfecting of the appeal not "readily available." This we will argue next.

II.

Donato's Case Presents Reasons for Considering It an Exception to the Rule.

The circumstances connected with appellant's failure to appeal are as follows:

The local board mailed SSS Form No. 110 (post card notice of classification, also containing advice of appellate deadline) on July 13, 1960 (Ex. 12). The law gives the registrant ten days from the date of mailing the notice to file with the board a written Notice of Appeal. It must be written; a phone call will not suffice. Donato therefore had to the close of business on July 23rd to file such a written Notice. Ordinarily the reasonably prudent per-

son does not wait to the last minute to perform an act that is important to him. On the other hand people ordinarily use nearly all the time available for the purposes of reflection and for improvement of written presentation. Even lawyers, who understand the jurisdictional factor involved in certain filings give themselves until the last two or three days.

In any event it is clear that Donato had made up his mind "to take an appeal within the 10 days" (T. 29), but that he was notified he should get ready for a fire in the Angelus National Forest and that he was called to fight this fire on the 20th and was kept in this area fighting fires until the 28th (T. 30).

His statement, on cross-examination (used by appellee in its brief pp. 6-7) that he chose not to exercise his right to appeal referred to his February, 1958, opportunity *not* to his July, 1960, opportunity. Appellant flatly stated, referring to the 1960 opportunity that he *had* made up his mind to take an appeal. He showed (R. T. 32-33) that in February, 1958, he was ignorant of the appeal process but with respect to July, 1960, "I had gotten further information on appealing this particular instance, and I was preparing information to send an appeal in."

It is easy to conclude that appellant should have acted as soon as he decided to appeal for we, as long experienced persons know that the unforeseen frequently robs us of the time allotted by rules, as well as that allotted by heredity and actuarial statistics. It too is easy to treat this registrant as administrative agencies, dealing with business

men who are generally advised by counsel, are empowered to treat dilatory citizens.

We argue, nevertheless, that selective service registrants are not experienced business men, are not advised by counsel[1] and are not to be so treated and that when a conflict in duty arises, as here, a neglect of one's personal affairs for a public duty is to be condoned.

Suppose he was a national guardsman? Suppose he was a public firefighter? Just where is the line to be drawn in this kind of a situation?

Although the courts properly affirm a confidence in the court-made rule of exhaustion of administrative remedies it is also a proper part of the appellate process to give a well-meaning young man a chance where he is deserving. We have already briefly quoted from some of the cases wherein this and other courts have gone out of their way to note that these registrants are not like the usual adult dealing with an administrative agency: *Cox* v. *Wedemeyer,* (9th Cir., 1951) 192 F.2d 920, where it was pointed out that these draft registrants are "unskilled in legal procedure * * * and none of them represented by counsel." (922-923); *Berman* v. *Craig,* (3 Cir., 1953) 207 F.2d 888, where the third circuit declared: "Registrants are not thus to be treated as though they were engaged in formal litigation assisted by counsel (891)."

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1. § 1624.1 (b) of 32 C.F.R. specifically forbids counsel at the Appearance Before Local Board: "And provided further, that no registrant may be represented before the local board by anyone acting as attorney or legal counsel."

III.

Clear Error of Law Excuses Failure to Exhaust Remedies.

Lack of due process is referred to as excusing the failure to exhaust remedies by Judge Frank in the Selective Service case of *Schwartz* v. *Strauss,* 206 F.2d 767.

It is the basis of cases like *Skinner Corp.* v. *United States, supra,* and the *United Fuel Gas* case, *supra,* which relieved a party of the necessity of exhausting administrative remedies.

The point seems to be recognized in *Estep* v. *United States,* 1945, 66 S. Ct. 423, in discussing an attempt to induct a congressman or classify a person as available for induction because he is a Negro, Jew or German, of which the Court says:

> "In all such cases its action would be lawless and beyond its jurisdiction."

It is the holding in *United States* v. *Donovan,* 178 F.2d 876 (C.A. 7th, 1949), a parole case excusing exhaustion where lack of due process is shown.

As noted in the paragraph above in *Estep* the Supreme Court considered the board acted beyond its jurisdiction when it classified without basis in fact. The Fifth Circuit in *Wiggins* v. *United States,* 1958, 261 F.2d 113, sums up this point in this manner:

> "Dickinson, following Estep, has established beyond any argument at this point that 'courts may properly insist [that when a local board denies a claimed exemption] there must be some proof that

> is incompatible with the registrant's proof of exemption'; a local board loses jurisdiction if there are insufficient facts in the record to support its conclusion".

It was on the theory of an allegation of lack of due process in military segregation that a Negro was allowed by the Eastern District of Pennsylvania to challenge a I-A classification without exhausting his administrative remedies in *United States* v. *Tomlinson,* 94 F. Supp. 854 (1953).

It was the basis of the decision of the same court in hearing a veteran's preference case even without exhaustion of administrative remedies:

> "Where a statute, which commands an official of the government to perform, or prohibits him from performing an act in a particular situation is so clear as to be free from doubt as to what it prescribes, a court will enjoin a violation of the Act even though the victim has not pursued his administrative remedies." Brainer v. Wallin, 79 F. Supp. 506, 508 (1951).

In *Wettre* v. *Hague,* 74 F. Supp. 396, a district court refused an injunction in a veteran's preference case because there had been no exhaustion of administrative remedies. Then the Supreme Court in *Sullivan* v. *Hilton,* 334 U.S. 323, decided the substantive rule contrary to that applied by the Civil Service Commission; so the Court of Appeals in *Wettre* v. *Hague,* 168 F.2d 825 (C.A. 1st, 1948), held that since the administrative action was a clear error of law, "there is no longer any occasion for the re-

quirement that they exhaust whatever administrative remedies they may have."

In *Ex parte Fabiani,* 105 F. Supp. 139 (1952), E.D. Penna., a medical student in Italy was allowed to defend against a I-A classification though he had not exhausted his administrative remedies. (He not only had not appealed, but he had not reported for physical examination or for induction.) The Court cited case after case where lack of due process and clear error of law were defenses to prosecution for selective service violations and concluded that exhaustion was excused under these cases.

In addition to the numerous cases cited in the Fabiani case, in which lack of due process and clear errors of law resulted in declaring classifications invalid and preventing convictions for their violation, many could be added because there are over 200 reported selective service cases since Korea, wherein one or more reasons have been given for a judgment of acquittal, or for reversal of a judgment of conviction.

In *United States* v. *Gatrell,* S.D. Fla., ... F. Supp. ..... (No. 10,512 decided February 24, 1960), Judge Register acquitted on the merits after pointing out:

> "Now it is clear from those facts and from the testimony that the defendant failed to exhaust his administrative remedies. In effect, it is the Government's contention in this case that, by reason of such failure, the defendant is precluded from all defense herein.
>
> "In numerous cases it is said that ordinarily a failure to exhaust administrative remedies precludes

the raising of a question of the propriety of the draft board's action. The Courts have uniformly held that the Courts are not to weigh the evidence to determine whether the classification made by a Local Board was justified and, further, that the decisions of Local Boards made in conformity with the regulations are final, even though they may be erroneous. However, Courts have also recognized as a fact that in some cases there is justification in relaxing the general rule above stated, and that the question of jurisdiction of a Local Board is reached only if there is no basis in fact for the classification which it gave to the registrant. This question is one of law for the Courts.

"This Court is of the opinion that the factual situation in a case may provide such justification, and that if the general rule heretofore referred to were to be applied absolutely and inflexibly and without exception, that the result might be so harsh as to be contrary to our concept of justice in the trial of criminal cases in our Courts. This has been in effect recognized in this Court or in this District, and I refer specifically to Criminal Case No. 10,335, United States of America v. Archie Young, which was decided by Judge Simpson."

CONCLUSION.

It is thus evident that many courts have seen fit to excuse a failure to exhaust administrative remedies and particularly so when the party is young and inexperienced and has a meritorious case otherwise.

Respectfully submitted,

J. B. Tietz,
Attorney for Appellant.

October 23, 1961.